



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 28, 2009

Mr. Mark Wolfe
Chief Deputy Executive Director
Texas Historical Commission
P.O. Box 12276
Austin, Texas 78711-2276

OR2009-10397

Dear Mr. Wolfe:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 350343.

The Texas Historical Commission (the "commission") received a request for information relating to archaeological operations at a particular location during a specified time interval. You state that some of the requested information either has been or will be released. You claim that other responsive information is excepted from disclosure under sections 552.107 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.¹

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made

¹This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the commission to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

“for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You seek to withhold the information submitted as Exhibit C under section 552.107(1). You state that the information in question, which is contained in e-mails, consists of privileged attorney-client communications. Based on your representations and our review of the information at issue, we conclude that section 552.107(1) is generally applicable to the information in Exhibit C. We note, however, that some of the individual e-mails in the e-mail strings consist of communications with non-privileged parties. To the extent that those e-mails, which we have marked, exist separate and apart from the e-mail strings, we conclude that they may not be withheld under section 552.107(1) and must generally be released. Except for any of the marked e-mails involving non-privileged parties that exist separate and apart from the e-mail strings, the commission may withhold Exhibit C under section 552.107(1).

You also claim section 552.137 of the Government Code for e-mail addresses in Exhibit B. Section 552.137 provides that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov’t Code § 552.137(a)-(b). The types of

e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees.

We have marked personal e-mail addresses in Exhibit B that the commission must withhold under section 552.137, unless the owner of a particular e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). *See id.* § 552.137(c)(1)-(2) (Gov't Code § 552.137(a) not applicable to e-mail address provided to governmental body by person who has contractual relationship with governmental body or contractor's agent or by vendor who seeks to contract with governmental body or vendor's agent). We also have marked personal e-mail addresses in the marked e-mails in Exhibit C that involve non-privileged parties. To the extent that the marked e-mails are not protected by section 552.107(1), the marked e-mail addresses must be withheld under section 552.137, unless the owner of the e-mail address has consented to its disclosure or the e-mail address falls within the scope of section 552.137(c). We note that Exhibit B contains the requestor's e-mail address. Because section 552.137 protects personal privacy, the requestor has a right of access to his own e-mail address under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a).² Therefore, the requestor's e-mail address may not be withheld in this instance under section 552.137.³ *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).

In summary: (1) the commission may withhold Exhibit C under section 552.107(1) of the Government Code, except for any of the marked e-mails involving non-privileged parties that exist separate and apart from the e-mail strings; and (2) the marked e-mail addresses in Exhibit B, as well as the marked e-mail addresses in Exhibit C to the extent that the related e-mails exist separate and apart from the e-mail strings, must be withheld under section 552.137 of the Government Code, unless the owner of an e-mail address has consented to its disclosure or the e-mail address falls within the scope of section 552.137(c). The commission must release the remaining information in Exhibit B. The marked e-mails in Exhibit C that involve non-privileged parties also must be released, except for the marked e-mail addresses, to the extent that the e-mails exist separate and apart from the e-mail strings.

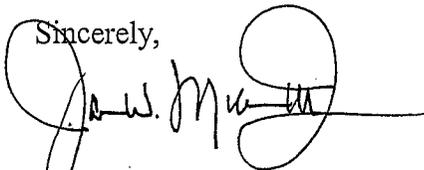
²Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

³Should the commission receive another request for these same records from a person who would not have a right of access to this requestor's e-mail address, the commission should resubmit these records and request another decision. *See* Gov't Code §§ 552.301, .302.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is stylized with large loops and a long horizontal stroke at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 350343

Enc: Submitted documents

c: Requestor
(w/o enclosures)